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PALM SPRING JOINT MANAGEMENT BODY & ANOR v. MUAFAKAT KEKAL SDN BHD & ANOR

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
MD RAUS SHARIF PCA
B HASAN LAH FCJ
ZAINUN ALI FCJ
ABU SAMAH NORDIN FCJ
[CIVIL APPEAL NO: 02(F)-14-02-2015(W)]
25 FEBRUARY 2016

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LAND LAW: *Strata title – Management corporation – Maintenance and management of building – Whether joint management body ('JMB') could co-exist with management corporation ('MC') – Whether JMB intended to be interim body – Establishment of JMB after MC established by opening of book of strata register* D *– Whether null and void – Whether JMB lawfully constituted – Building and Common Property (Maintenance and Management) Act 2007, s. 4(1) – Strata Titles Act 1985, s. 15*

The first respondent, Muafakat Kekal Sdn Bhd ('Muafakat Kekal') was the developer of the residential condominium development, Palm Spring E Condominium ('the condominium'). Perbadanan Pengurusan Palm Spring, the second appellant, was the Management Corporation ('MC') established under the Strata Titles Act 1985 ('Strata Act') on 8 January 2008. The first appellant, Palm Spring Joint Management Body ('JMB'), was a statutory body purportedly established under s. 4 of the Building and Common F Property (Maintenance and Management) Act 2007 ('Building and Common Property Act') on 5 April 2008. The first general meeting of the MC was called by Muafakat Kekal as the original proprietor of the condominium on 4 September 2011. However, due to lack of quorum, that general meeting was adjourned to 11 September 2011. Muafakat Kekal contended that the G general meeting failed to take place on 11 September 2011 because it was not possible nor safe to proceed with the general meeting due to the disturbance caused by the members of JMB. On the other hand, JMB took the position that the general meeting was duly held on 11 September 2011 as scheduled and that a council was duly appointed on that date. Muafakat Kekal contended that a general meeting was in fact held at a different venue on H 15 October 2011. Dispute then arose between the two factions. Muafakat Kekal thus commenced this suit claiming for, *inter alia* (i) a declaration that the general meeting called by Muafakat Kekal on 15 October 2011 was valid and in accordance with the Strata Act; and (ii) a declaration that the establishment of the JMB was not valid and contravened s. 4(1)(a) of the I Building and Common Property Act. In its defence, JMB claimed that it was lawfully constituted and pleaded *res judicata* as well as estoppel. JMB then

counterclaimed for, *inter alia* (i) a declaration that the general meeting on 11 September 2011 was valid and in accordance with the Strata Act; and (ii) a declaration that JMB was a body lawfully established under the Building and Common Property Act. The High Court dismissed Muafakat Kekal's claims and allowed JMB's counterclaims. The Court of Appeal, however, in allowing Muafakat Kekal's claims, held that the establishment of the JMB was void *ab initio* as it was contrary to the relevant provisions of the Strata Act and the Building and Common Property Act. The issues that arose before this court were (i) whether under the scheme of the Strata Act and the Building and Common Property Act, the JMB and the MC could co-exist side by side; and (ii) whether the JMB could be established under the Building and Common Property Act when there was already in existence the MC which was established under the Strata Act.

Held (dismissing appeal with costs)
Per Arifin Zakaria CJ delivering the judgment of the court:

(1) Section 4(1)(a) and (b) of the Building and Common Property Act, it provides that when vacant possession of the parcel has been delivered, but the MC has not come into existence, then the JMB is to take over the management of the building. The JMB is intended to be an interim body to cater for instances where there has been a delay in the issuance of strata titles. Section 4(1)(a) and (b) of the Building and Common Property Act does not apply in cases where strata titles have in fact been issued and the book of strata register has been opened under s. 15 of the Strata Act, as in the present case. Therefore, under the Building and Common Property Act, the JMB is only an interim body established for the purpose of carrying out the functions of MC pending the establishment of MC and once the MC is established, the JMB is automatically dissolved. The MC and the JMB were never intended to co-exist side by side at one and the same time. (paras 29-31)

(2) The MC was established on 8 January 2008 while the JMB was established on 5 April 2008. On the date of the purported establishment of the JMB, the MC was already in existence. The fact that no general meeting of the MC was called until three years down the line did not affect the legality of the MC. It was thus contrary to the legislative scheme under the Strata Act and the Building and Common Property Act to have the JMB established after the establishment of the MC, which the appellants in the instant case purported to do. Thus, the JMB was unlawfully constituted and its establishment was thus null and void *ab initio*. (paras 32 & 33)

***Bahasa Malaysia** Headnotes*

Responden pertama, Muafakat Kekal Sdn Bhd ('Muafakat Kekal') adalah pemaju pembangunan kediaman kondominium, Palm Spring Condominium ('kondominium'). Perbadanan Pengurusan Palm Spring, perayu kedua,

adalah Perbadanan Pengurusan ('MC') yang ditubuhkan di bawah Akta Hak Milik Strata 1985 ('Akta Strata') pada 8 Januari 2008. Palm Spring Joint Management Body, perayu pertama ('JMB') adalah sebuah badan berkanun yang ditubuhkan di bawah s. 4 Akta Bangunan dan Harta Bersama (Penyelenggaraan dan Pengurusan) 2007 ('Akta Bangunan dan Harta Bersama') pada 5 April 2008. Mesyuarat agung pertama MC telah dipanggil oleh Muafakat Kekal sebagai pemilik asal kondominium pada 4 September 2011. Walau bagaimanapun, disebabkan oleh korum yang tidak mencukupi, mesyuarat agung itu ditangguhkan ke 11 September 2011. Muafakat Kekal menghujahkan bahawa mesyuarat agung itu gagal dilaksanakan pada 11 September 2011 disebabkan gangguan oleh ahli-ahli JMB. Pihak JMB pula berpendirian bahawa mesyuarat agung telah dilaksanakan pada 11 September 2011 seperti dijadualkan dan satu majlis telah dilantik dengan sewajarnya pada tarikh tersebut. Muafakat Kekal menghujahkan bahawa satu mesyuarat agung dilaksanakan di tempat lain pada 15 Oktober 2011. Pertikaian kemudiannya timbul antara kedua-dua pihak. Muafakat Kekal, oleh itu, memulakan guaman ini, menuntut, antara lain (i) deklarasi bahawa mesyuarat agung yang dipanggil oleh Muafakat Kekal pada 15 Oktober 2011 adalah sah dan menurut Akta Strata; dan (ii) deklarasi bahawa penubuhan JMB tidak sah dan melanggar s. 4(1)(a) Akta Bangunan dan Harta Bersama. Sebagai pembelaan, JMB mendakwa bahawa ia ditubuhkan dengan sah dan memplidkan *res judiata* serta estoppel. JMB pula menuntut balas bagi antara lain (i) deklarasi bahawa mesyuarat agung pada 11 September 2011 sah dan menurut Akta Strata; dan (ii) deklarasi bahawa JMB satu perbadanan yang ditubuhkan mengikut undang-undang di bawah Akta Bangunan dan Harta Bersama. Mahkamah Tinggi menolak tuntutan Muafakat Kekal dan membenarkan tuntutan balas JMB. Mahkamah Rayuan pula membenarkan tuntutan Muafakat Kekal dan memutuskan bahawa penubuhan JMB batal *ab initio* kerana bertentangan dengan peruntukan Akta Strata dan Akta Bangunan dan Harta Bersama yang berkaitan. Isu-isu yang timbul di mahkamah ini adalah (i) sama ada di bawah skim Akta Strata dan Akta Bangunan dan Harta Bersama, JMB dan MC boleh wujud bersama; dan (ii) sama ada JMB boleh ditubuhkan di bawah Akta Bangunan dan Harta Bersama sedangkan wujud MC yang ditubuhkan di bawah Akta Strata.

Diputuskan (menolak rayuan dengan kos)
Oleh Arifin Zakaria KH menyampaikan penghakiman mahkamah:

(1) Seksyen 4(1)(a) dan (b) Akta Bangunan dan Harta Bersama memperuntukkan bahawa apabila milikan kosong telah diserahkan, tetapi MC tidak lagi wujud, JMB harus mengambil alih pengurusan bangunan. JMB diniatkan sebagai sebuah badan interim bagi memenuhi keadaan apabila terdapat kelewatan dalam pengeluaran hak milik strata. Seksyen 4(1)(a) dan (b) Akta Bangunan dan Harta Bersama tidak terpakai dalam kes hak milik strata telah dikeluarkan dan buku daftar strata dibuka di bawah s. 15 Akta Strata, seperti dalam kes ini. Oleh itu, di

bawah Akta Bangunan dan Harta Bersama, JMB hanya badan interim yang ditubuhkan untuk menjalankan fungsi-fungsi MC sementara menunggu penubuhan MC dan sebaik sahaja MC ditubuhkan, JMB terbubar secara automatik. MC dan JMB tidak pernah diniatkan untuk wujud bersama pada satu masa yang sama.

(2) MC ditubuhkan pada 8 Januari 2008 dan JMB telah ditubuhkan pada 5 April 2008. Pada tarikh JMB ditubuhkan, MC sudah wujud. Fakta bahawa mesyuarat agung MC tidak dipanggil selama tiga tahun tidak menjejaskan kesahihan MC. Oleh itu, ini bertentangan dengan skim perundangan di bawah Akta Strata dan Akta Bangunan dan Harta Bersama untuk JMB ditubuhkan selepas penubuhan MC, yang cuba dibuat oleh perayu-perayu dalam kes ini. Oleh itu, JMB telah ditubuhkan menyalahi undang-undang dan penubuhannya batal *ab initio*.

Case(s) referred to:

Cayman Development (SP) Sdn Bhd v. Badan Pengurusan Bersama Kompleks Cayman & Anor [2013] 1 LNS 150 HC ***(refd)***

Legislation referred to:

Building and Common Property (Maintenance and Management) Act 2007, s. 4(1)(a), (b)

Strata Titles Act 1985, ss. 4, 15, 17, 39(1), (2A), 41, 45, 46

For the appellants - Justin Voon (Annou Xavier, Robin FS Lim & Ng Li Kian); M/s Azri, Lee Swee Seng & Co

For the 1st respondent - Ringo Low; M/s Ringo Low & Assocs

For the 2nd respondent - Ihsan Busyro Zakaria; M/s Rusmah Arunan & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Arifin Zakaria CJ:

Introduction

[1] This is an appeal by the appellants against the decision of the Court of Appeal dated 22 July 2013 which allowed the respondents' appeal. Leave to appeal was granted by this court on 5 February 2015 on the following questions of law:

(i) Can a Joint Management Body ("JMB"), be formed after and/or co-exist with, a Management Corporation ("MC") formed *vide* the opening of a Strata Register under Section 39(1) of the Strata Titles Act 1985 whilst awaiting the First Annual General Meeting ("AGM") of the Management Corporation which has not taken place [since the JMB can exist until the time 3 months have expired from the date of the said first AGM of the MC, in which case the JMB will be dissolved under Section 15(1) of the Building And Common Property (Maintenance And Management) Act 2007]?

A (ii) Whether a JMB can be established pursuant to section 4(1) Building and Common Property (Maintenance and Management) Act 2007 to maintain and manage a building even though the MC has been established by the opening of a book of the strata register pursuant to section 39, Strata Titles Act 1985?

B **Background Facts**

[2] Muafakat Kekal Sdn Bhd, the first respondent, (Muafakat Kekal) was the developer of the residential condominium development known as Palm Spring Condominium @ Damansara (the condominium). It was the original proprietor of the land on which the condominium was developed.

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[3] Perbadanan Pengurusan Palm Spring @ Damansara, the second appellant, is the Management Corporation (MC) which was established under the Strata Titles Act 1985 (Act 318) on 8 January 2008.

[4] Palm Spring Joint Management Body, the first appellant, (JMB) was
D a statutory body purportedly established under s. 4 of the Building and Common Property (Maintenance and Management) Act 2007 (Act 663) on 5 April 2008.

[5] The first general meeting of the MC was called by Muafakat Kekal as the original proprietor of the condominium, on 4 September 2011. JMB
E applied to the High Court for an injunction to restrain Muafakat Kekal from holding the general meeting. The application was dismissed by the High Court on 2 September 2011. However, due to lack of quorum, that general meeting was adjourned to 11 September 2011.

[6] Muafakat Kekal contended the general meeting failed to take place on
F 11 September 2011 because it was not possible nor safe to proceed with the general meeting due to the disturbance caused by members of JMB.

[7] On the other hand, JMB took the position that the general meeting was duly held on 11 September 2011 as scheduled and that a council was duly appointed on that date.

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[8] Muafakat Kekal contended that a general meeting was in fact held at a different venue on 15 October 2011 and a copy of the minutes of meeting was sent to Pesuruhjaya Bangunan, Majlis Bandaraya Petaling Jaya, the second respondent.

H **[9]** Dispute then arose between the two factions which led to a meeting convened by the Federal Director General of Land and Mines on 8 November 2011 and in that meeting it was resolved that Pesuruhjaya Bangunan, Majlis Bandaraya Petaling Jaya was to direct Muafakat Kekal to produce the audited accounts of Muafakat Kekal from 2008 until the current
I period, failing which the general meeting held on 11 September 2011 would be declared to be valid and the appointment of members of the council on that date would also be valid.

[10] Muafakat Kekal claimed that it could not produce the required audited accounts in view of the fact that by Suit No. S5-22- 868-2006, JMB had, at first obtained an *ex parte* injunction on 28 August 2008 and followed by a permanent injunction on 28 June 2010 against Muafakat Kekal and had excluded Muafakat Kekal from the management of the condominium and had in fact commenced committal proceedings against Muafakat Kekal for its failure to comply with the terms of the injunction.

The High Court

[11] It was against that backdrop of facts that Muafakat Kekal commenced this suit claiming, *inter alia*, the following reliefs:

(a) a declaration that the general meeting called by Muafakat Kekal on 15 October 2011 was valid and in accordance with Act 318;

(b) a declaration that the general meeting on 11 September 2011 was not conducted by Muafakat Kekal and was null and void;

(c) a declaration that the establishment of the JMB was not valid and contravened s. 4(1)(a) of the Building and Common Property (Maintenance and Management) Act 2007 (Act 663); and

(d) a declaration that the act of Pesuruhjaya Bangunan, Majlis Bandaraya Petaling Jaya who attempted to validate the meeting of 11 September 2011 and the appointment of members of the council on 11 September 2011 was '*ultra vires*'.

[12] In its defence, JMB claimed that it was lawfully constituted. JMB also pleaded *res judicata* and estoppel. JMB then counterclaimed for, *inter alia*, the following reliefs:

(a) a declaration that the general meeting held on 11 September 2011 was valid and in accordance with Act 318;

(b) a declaration that the general meeting held on 15 October 2011 was null and void;

(c) a declaration that JMB was a body lawfully established under Act 663;

(d) an order that any new account or management fund under s. 45, or special account under s. 46, of Act 318 opened by Muafakat Kekal pursuant to the general meeting of 15 October 2011 be closed forthwith and all monies in those accounts be paid into the account maintained by the JMB;

(e) general damages to be assessed; and

(f) exemplary and aggravated damages of RM500,000, or alternatively to be assessed.

A **Decision Of The High Court**

[13] After a full trial, the High Court dismissed Muafakat Kekal's claims and allowed the JMB's counter claims. The High Court made the following orders:

B (a) that the meeting held on 11 September 2011 is declared valid in line with Act 318;

(b) that the subsequent meeting held on 15 October 2011 is declared void;

(c) that the JMB is a body validly established under Act 663;

C (d) that all the management accounts set up by Muafakat Kekal under the Act 318 following from the meeting held on 15 October 2011 be closed forthwith and all monies therein be paid over to the account held by the JMB; and

(e) that Muafakat Kekal has to pay the sum of RM500,000 as general and
D aggravated damages to the JMB.

Court Of Appeal

[14] Dissatisfied, Muafakat Kekal then appealed to the Court of Appeal. The Court of Appeal allowed Muafakat Kekal's appeal and made the
E following orders:

> 47. In view of the Plaintiffs' concession with respect to paragraphs (a) and (b) of the High Court Order and our conclusion that the establishment of the 2nd Defendant was *void ab initio*, we varied the High Court order as follows:
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> F (a) Paragraphs (a) and (b) of the High Court Order were affirmed;
>
> (b) Paragraph (c) of the Order and the order for damages were set aside;
>
> (c) in paragraph (d) of the Order, the reference to the 2nd Defendant (the Joint Management Body) was replaced with the
> G reference to the 2nd Plaintiff (the management corporation).

In short, the Court of Appeal held that the establishment of the JMB was void *ab initio* as it was contrary to the relevant provisions of Act 318 and Act 663.

This Court

H **[15]** The issue before us is whether the JMB can be established under Act 663 when there is already in existence the MC which was established under Act 318?

Establishment Of Management Corporation

I **[16]** From the questions posed, we can assume that the JMB was formed after the establishment of the MC. Therefore, the question is whether, under the scheme of Act 318 and Act 663, the two bodies, namely the JMB and the MC can co-exist side by side. The appellants contended that the answer

is in the positive as there is nothing under Act 318 and Act 663 prohibiting the two bodies existing side by side. The respondents held the opposite view. The Court of Appeal agreed with the respondents.

[17] To answer the questions, it is necessary for us to consider how the two bodies came into existence under the respective Act.

[18] The MC is a body which came to be established under Act 318. Section 15 of Act 318 provides:

> Preparation and maintenance of strata register
>
> 15. (1) The Registrar shall prepare and maintain for the purposes of this Act a register of strata titles to be known as the strata register.
>
> (2) The strata register shall consist of a series of books, each relating to one lot, and every such book shall contain-
>
> (a) an index in Form 2 to the individual parcels and, if any, appurtenant accessory parcels and to the individual provisional block, if any, comprised in the lot;
>
> (b) a statement in Form 3 which subject to subsections (4), (5) and (6) shall:
>
> (i) set out, or where appropriate summarize so far as they relate to matters capable of affecting any of those parcels or provisional blocks, all memorials, endorsements and other entries which appeared on the register document of title to the lot at the time the statement was authenticated by the Registrar; or
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> (ii) confirm that there were no such entries;
>
> (c) a copy of the certified strata plan prepared under paragraph 13(1)(a); and
>
> (d) the register document of title to each parcel and each provisional block.
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> (3) The name of the management corporation, and the address for the service of documents thereon, required to be stated in the index in Form 2 shall be supplied to the Registrar by the proprietor of the lot.

[19] Section 17 of Act 318 provides that when a book of strata register is opened, the strata register and the document of title to the lot will have a memorial entered by the Registrar of Titles stating that such book has been opened. What is the effect of the opening of the book of strata register?

[20] This is provided in s. 39(1) of Act 318 which reads:

> Establishment of management corporation
>
> 39. (1) **Upon the opening of a book of the strata register in respect of a subdivided building there shall, by the operation of this section, come into existence a management corporation** consisting of all the parcel proprietors including in the case of phased development, the proprietor of the provisional block or blocks.
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> (emphasis added)

[21] In the present case, it is not in dispute that the book of strata register was opened on 8 January 2008. A certificate of the same date was issued pursuant to s. 39(2A) of Act 318, stating to the effect that "Perbadanan Pengurusan Palm Spring@Damansara" is the MC for the condominium. However, no general meeting of the MC was called by the developer until 4 September 2011.

[22] By s. 41 of Act 318, the developer is required to convene the first general meeting of the management corporation within one month of the expiry of the initial period. The term "initial period" is defined in s. 4 of Act 318 as follows:

> "initial period" in relation to a management corporation, means the period commencing on the day on which the management corporation is formed and ending on the day on which there are proprietors, excluding the proprietor of the lot who is registered as the proprietor of a parcel or parcels or a provisional block or blocks, the sum of whose share units is at least one-third of the aggregate share units;

[23] There is no evidence led as to when the initial period in the present case ended. In any event, we are of the view that it is of no relevance to the issue before us.

[24] In the present case, despite the fact that the MC was established as early as 8 January 2008, the first general meeting was only convened on 4 September 2011 which was adjourned, due to lack of quorum to 11 September 2011. The High Court in its finding held that the meeting of 11 September 2011 and the election of council by the general meeting on the date to be valid. The Court of Appeal agreed with the finding of the High Court.

Establishment Of Joint Management Body

[25] Let us now consider how the JMB is established. JMB is a body established under the Building and Common Property (Maintenance and Management) Act 2007 (Act 663). This Act is intended to put in place a legislative scheme to ensure the proper management and maintenance of a strata development pending the opening of a book of strata register and the coming into being of the MC. This may be derived from the speech of the Minister for Housing and Local Government in tabling the Bill for second reading in the Dewan Rakyat on 12 December 2006 where he stated:

> Rang Undang-undang Bangunan dan Harta Bersama ini juga memperkenalkan satu elemen baru iaitu Badan Pengurusan Bersama dengan izin, Joint Management Body atau JMB yang ditubuhkan dalam tempoh interim untuk mengambil alih tugas dan tanggungjawab pemaju dalam menyelenggara dan mengurus harta bersama sesuatu bangunan itu **sehinggalah hak milik strata diperolehi.**
>
> (emphasis added)

[26] The establishment of the JMB is governed by s. 4 of the Act 663 which reads:

> Establishment of a Joint Management Body
>
> 4. (1) Where a building or land intended for subdivision into parcels has been completed -
>
> (a) before the commencement of this Act and vacant possession of the parcels has been delivered by the developer to purchasers but the management corporation has not come into existence, a Joint Management Body shall be established consisting of the developer and the purchasers upon the convening of the first meeting not later than twelve months from the commencement of this Act; and
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> (b) on or after the commencement of this Act, a Joint Management Body shall be established consisting of the developer and the purchasers upon the convening of the first meeting not later than twelve months from the date of delivery of vacant possession of the parcels to the purchaser.

[27] In the present case, there was no evidence led as to when the condominium was completed, therefore we could not decide whether it was completed before or after the commencement of Act 663. Be that as it may, we are of the view that this is not material to the present case as the facts of the present case clearly show that the MC was in fact established prior to the JMB.

[28] Further, it is common ground that, the book of strata register was opened on 8 January 2008. Therefore, we can safely assumed that the strata titles to the condominium had been issued prior to that date.

[29] By s. 4(1)(a) and (b) of Act 663, it provides that when vacant possession of the parcel has been delivered, but the MC has not came into existence, then the JMB is to take over the management of the building. It is also clear that the JMB is intended to be an interim body to cater for instances where there has been a delay in the issuance of strata titles. Section 4(1)(a) and (b) of Act 663 do not apply in cases where strata titles have in fact been issued and the book of strata register has been opened under s. 15 of Act 318, as in the present case.

[30] Therefore, under Act 663, the JMB is only an interim body established for the purpose of carrying out the functions of MC pending the establishment of MC and once the MC is established, the JMB is automatically dissolved. This is expressly provided in s. 15 of Act 663 which reads:

> Dissolution of Joint Management Body
>
> 15. (1) The Body shall be deemed to be dissolved three months from the date of the first meeting of the management corporation for the building.

[31] From the above, it is clear that the MC and the JMB was never intended to co-exist side by side at one and the same time. In this regard, we wish to record our agreement with the finding of the learned High Court Judge on a similar issue in *Cayman Development (SP) Sdn Bhd v. Badan Pengurusan Bersama Kompleks Cayman & Anor* [2013] 1 LNS 150; [2014] 8 MLJ 894.

[32] In the instant case the MC was established on 8 January 2008 while the JMB was established on 5 April 2008. This means to say that on the date of the purported establishment of the JMB, the MC was already in existence. The fact that no general meeting of the MC was called until three years down the line, in our view, does not affect the legality of the MC. It is thus contrary to the legislative scheme under Act 318 and Act 663 to have the JMB established after the establishment of the MC, which the appellants in the instant case purported to do.

[33] In the result, we agree with the Court of Appeal that the JMB was unlawfully constituted and its establishment is thus null and void *ab initio*.

Conclusion

[34] For the above reasons, we answer the questions posed to us in the negative. The appeal is accordingly dismissed with costs.